United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7059

To be argued by
A. SETH GREENWALD

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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RELAXATION PLUS COMMODORE, INC.,

Plaintiff-Appellant,

-against-

REALTY HOTEL, INC., THE HONORABLE EDWARD THOMPSON, Individually and as Administrative Judge of the Civil Court of the City of New York, and "John Doe" (Fictitious name) Individually and as City Marshal of the City of New York,

Defendants-Appellees.

----------X

BRIEF FOR DEFENDANT-APPELLEE THOMPSON

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant-
Appellee Thompson
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. (212) 488-3396

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

A. SETH GREENWALD
Assistant Attorney General
of Counsel

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Plaintiff-Appellant,	:	Docket No. 76-7059
- against -	:	
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BRIEF FOR DEFENDANT-APPELLEE
THOMPSON

Questions Presented

(1) Did the complaint present as substantial constitutional question as to (N.Y.) Penal Law § 230.00, Real Property Law § 231(1), and Real Property Actions and Proceedings Law § 711, subd. 5?

(a) Did the complaint satisfy the requirements for convening a three-judge court, 28 U.S.C. § 2281?

(2) Is there a real case or controversy as to the constitutionality of (N.Y.) Penal Law § 230 (prostitution)?

(3) Do principles of equity, federalism and comity bar this action in the exercise of discretion by the court below?

(4) Did res judicata or collateral estoppel bar the action?

Statement

This is an appeal from an order of the United States District Court, Southern District of New York (Werker, D.J., February 4, 1976) (52a).* The court below denied the appellee's motion to convene a three-judge court, 28 U.S.C. §§ 2281, 2284, denied a temporary or preliminary injunction and dismissed the complaint.

*Numbers in parentheses followed by "a" refer to Appendix of appellant.

Statutes Involved

Real Property Law (N.Y.) § 231(1):

> "Lease, when void; liability of landlord where premises are occupied for unlawful purpose.
>
> 1. Whenever the lessee or occupant other than the owner of any building or premises, shall use or occupy the same, or any part thereof, for any illegal trade, manufacture or other business, the lease or agreement for the letting or occupancy of such building or premises shall thereupon become void, and the landlord of such lessee or occupany may enter upon the premises so let or occupies."

Real Property Actions and Proceedings Law (N.Y.) § 711(5).

> "Grounds where landlord-tenant relationship exists; roomer in city having population of one million or more.
>
> An occupant of one or more rooms in a rooming house in a city having a population of one million or more, who has been in possession for thirty consecutive days or longer is a tenant under this article; he shall not be removed from possession except in a special proceeding. A special proceeding may be maintained

under this article upon the following grounds:

* * *

5. The premises, or any part thereof, are used or occupied as a bawdy-house, or house or place of assignation for lewd persons, or for purposes of prostitution, or for any illegal trade or manufacture, or other illegal business."

Penal Law (N.Y.) § 230.00.

"A person is guilty of prostitution when such person engages or agrees or offers to engage in sexual conduct with another person in return for a fee."

Facts

Despite appellant's extended discussion, the facts of this case are quite simple. The appellee Realty Hotels, Inc. as landlord brought an eviction proceeding against plaintiff, as tenant, in the State Civil Court. The plaintiff raised various defenses in the Civil Court and lost. It appealed twice (Appellate Term, Appellate Division) and lost again. These matters are set forth in the opinion below (52a-53a).

Opinion Below

District Judge Werker in an opinion (and order) (52a et seq.), dismissed the complaint.

First, the court held there was no case or controversy requiring a three-judge court.

Second, the court held that comity barred maintenance of the action.

POINT I

APPELLANT'S CONSTITUTIONAL CLAIMS ARE INSUBSTANTIAL.

To convene a three-judge court, a constitutional attack on a state statute must be raised which is "substantial". Goosby v. Osser, 409 U.S. 512, 518 (1973). Appellant here alleges no constitutional questions, let alone a substantial constitutional question, as to any of the state statutes it attacks.

Appellant purported to attack New York Real Property Actions and Proceedings Laws 711(5) and Real Property Law 231(1) and Multiple Dwelling Law § 352, both

facially and as applied. Original Order to Show Cause, (27a). However, a review of all the papers below shows that the real complaint was only as to the manner in which these state law provisions were supplied by the New York courts in this particular case.* This does not raise a federal question of any kind. The state courts are the final expositors of state law. England v. Louisiana Board of Medical Examiners, 375 U.S. 411, 415 (1964). In effect appellant under the guise of bringing a constitutional claim would have the District Court sit in appellate review of state court decisions and rulings and indeed pass an appellant's eviction dispute. This is not permitted. Murray v. Oswald, 333 F. Supp. 490 (S.D.N.Y. 1971). Even assuming a state court ruling was totally in error under state law, no constitutional issue would be raised.

It is unnecessary to reach the question as to whether appellant's constitutional attack on Penal Law § 230.00 is of substantial proportions, since appellant

*There is no bona fide claim of facial unconstitutionality at all. This is not even argued. See Appellant's Brief, Point Heading One, p. 14.

is not in a position to assert such a claim in this court. Point Two, infra. Appellant's claims as to overbreadth and vagueness are in any event without merit. The statutory language is plain and presents no difficulty. Additionally this section has received significant interpretation in the state courts. See e.g. People v. Block, 71 Misc 2d 714, 337 N.Y.S. 2d 153 (Nassau Co. 1972). The Court below was quite correct (55a) that the constitutional attack was frivolous citing Roth v. United States, 354 U.S. 476, 491 (1957). Further it was noted bolow (55a-56a) that when the Mann Act, §§ 2421, 2433 which prohibits conduct relating to interstate travel for "prostitution or debauchery, or for any other immoral purpose," was challenged for vagueness, it was upheld; United States v. Caesar, 368 F. Supp. 328 (E.D. Wisc. 1973), aff. 519 F 2d 1405 (7th Cir., 1975); see also Cleveland v. United States, 329 U.S. 14 (1946); Caminetti v. United States, 242 U.S. 470 (1917); United States v. Tyler, 459 F 2d 647 (10th Cir.), cert. denied, 409 U.S. 951 (1972). See too: United States v. Nassau, 476 F. 2d 1111 (7th Cir. 1973).

Any complaints about state court procedure as to eviction are barred by Lindsey v. Normet, 405 U.S. 56 (1972). The Constitution has not "federalized" the landlord-tenant relation.

POINT II

APPELLANT HAS NO STANDING TO ATTACK PENAL LAW 230.00; AS TO THIS CLAIM THERE IS NO EXTANT CASE OR CONTROVERSY.

Appellant attempt to attack the constitutionality of Penal Law § 230.00 must fail. Appellant has no standing to raise this claim, and no case or controversy exists as to this claim.

Section 230.00 of the Penal Law is a penal statute. The appellant is "Relaxation Plus Commodore, Inc." There is no claim that this named party is subject to or threatened with criminal sanction for violation of § 230.00. There is no claim that this named party is suffering personal injury becasue it does not know what forms of behavior are proscribed by the statute. There is no claim even that any of its employees have been arrested, threatened with arrest, or convicted for violating § 230.00, -- quite the contrary. App. Br. 4. In short, there is simply no case

or controversy here, and no constitutional issue raised "in the context of a specific live grievance." Golden v. Zwickler, 394 U.S. 102, 110 (1969). Appellant simply has been found to have violated its lease with the landlord and an order of eviction issued in the state court.

As the District Court said in Mendez v. Heller, 380 F. Supp. 985, 990 (E.D.N.Y. 1974), vacated 420 U.S. 916, aff. on remand, ____ F. 2d ____ (2d Cir., Slip Opin., p. 1841, Feb. 10, 1976):

> "Normally issues, and particularly issues of constitutional dimensions, are not determined except where they are necessarily drawn in question by litigation over real and present disputes in which the interest of each party requires that it seek a determination of the issue in an opposite sense of that sought by the other party."

The Court also went on to state (at 990):

> "But it would seem that the Attorney General would insist that he not be called on to put the statute at risk except where its validity was necessarily drawn in question in a litigation between adverse parties the disposition of whose rights inescapably required passing on the validity of the statute."

In the context of this case, appellant's attack on § 230.00 not only is defective for lack of standing and for lack of a live case or controversy, but also is irrelevant besides. The eviction, in appellant's own words, was sought by the landlord because the premises are used as "a bawdy house, or house or place of assignation for lewd persons, or for purpose of prostitution, or for other illegal business or use." App. Br., 4. Paragraph 41 of the lease, as set forth in App. Br. p. 2, does not even mention the word "prostitution." The lease requires the tenant to operate the business in a "high class manner" and prohibits "lewd or lascivious activities." These are a matter of contract, not constitutional law. The simple fact is that the constitutionality of § 230.00 is totally and completely unrelated to this eviction dispute in state court.

Appellant appears to assume that its employees do not know what acts are proscribed by the statute, and that they are "chilled" from exercising certain alleged rights. However this is nowhere alleged. Furthermore, the "rights" must be to enable in prostitution and to operate a bawdy house, a nuisance beyond possible dispute.

and an affront to this court to assert such claim here.

Apart from that the appellant cannot assert purported rights belonging to others for reasons of its own. In Aguayo v. Richardson, 352 F. Supp. 462 (S.D.N.Y. 1972), modified 473 F. 2d 1090 (2d Cir. 1973), stay den. 410 U.S. 921, cert. denied 414 U.S. 1146, the Court of Appeals ruled (at 1099) that welfare organizations had no standing to sue for injuries to its members under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3). Clearly the same principle is applicable here. The Supreme Court has made it clear that standing and case and controversy requirements in civil rights cases are to be strictly construed and adhered to. Rizzo v. Goode, ____ U.S. ____, 46 L. Ed. 2d 561 (Jan. 21, 1976).

POINT III

28 U.S.C. § 2281 DOES NOT APPLY SINCE APPELLANT DOES NOT SEEK TO RESTRAIN ANY STATE OFFICER IN THE ENFORCEMENT OF ANY STATE STATUTE. THERE IS NO CASE OR CONTROVERSY BETWEEN THE PARTIES.

A three-judge court is also inappropriate and the complaint properly dismissed because appellant does not seek to restrain the enforcement of any state statute

by restraining the action of any officer of such state, a prerequisite to three-judge court action. 28 U.S.C. § 2281.

The only officer named as a defendant is Judge Thompson; he, however, has nothing to do with this case, and it is not alleged that he has done anything improper. The Supreme Court in Rizzo v. Goode, ____ U.S. ____, supra, 44 U.S.L.W. 4095, 4099, 4100 (Jan. 21, 1976) has made clear the importance of personal involvement of a named defendant in establishing liability under civil rights cases. The unknown marshall is simply an officer appointed to carry out the mandate of the courts. His duties are administrative (54a) and most assuredly there is no jurisdiction over him as he was not served.

Controlling here is Mendez v. Heller, supra, 380 F. Supp. 985, remanded for entry of fresh decree from which a timely appeal can be made to Court of Appeals, 420 U.S. 918 (1975), aff'd sub. nom. Mendez-Roman v. Heller, ____ F. 2d ____ (2d Cir. 1976), O'Shea v. Littleton, 414 U.S. 488, 493-5 (1974); Huffman v. Pursue, Ltd., 420 U.S. 592, 611 (1973).

POINT IV

THE COURT HAS NO JURISDICTION; PRINCIPLES OF COMITY REQUIRED THAT THE DISTRICT COURT ABSTAIN.

In effect, appellant wanted the District Court to intervene in on-going state court proceedings. 28 U.S.C. § 2283 and relevant Supreme Court authority in the circumstances of this case forbade such intervention.

Appellants claimed that Mitchum v. Foster, 407 U.S. 225 (1972) makes an exception to § 2283 for § 1983 cases. This is simply not the law. The Supreme Court there only held that a district court was not absolutely without power in a 1983 action to enjoin a pending proceeding in a state court under any circumstances whatsoever. (emphasis added). 407 U.S., at 243. The Supreme Court emphasized that it was not in any way diluting or questioning principles of federalism, equity and comity. 407 U.S., at 243. This was specifically re-emphasized by the Supreme Court only recently. Rizzo v. Goode, supra, 44 U.S.L.W. 4095, 4100 (1976). It is clear that notions of federalism prevail in § 2283 cases notwithstanding that the action is brought pursuant to

42 U.S.C. § 1983.

In the instant case the circumstances clearly did not warrant the assumption of federal jurisdiction. By appellants' admission an appeal is or was pending in the State Court of Appeals. Kassner affidavit, (42a). The state court processes should be allowed to run their course.

Huffman v. Pursue, Ltd., 420 U.S. 592, supra was properly applied in the opinion below (54a-55a) as a "public nuisance" is involved. There is no reason to invoke federal jurisdiction after the state courts have considered the claims herein and rejected them. From the state courts, relief can be obtained from the United States Supreme Court.

To the extent appellant's instant constitutional claims were or are presented to the state appellate courts,* federal jurisdiction would clearly be doubtful. Tang v. Appellate Division, 487 F. 2d 138, 141 (2d Cir. 1973), cert. denied 416 U.S. 906. To the extent plaintiff's

*This is not clear from appellant's papers. See Kassner affidavit, (40a). The Kassner affidavit did not mention that the constitutionality of § 230.00 was challenged in Appellate Term. In any event, the statutes, and the others, should be construed by the state courts in light of the constitutional claim. Carey v. Sugar, 44 L.W. 4416 (Mar. 24, 1976).

constitutional claims may not have been presented to the state courts, they should have been, and little purpose would not be served to permit appellant to begin an action in federal court when it had a perfect opportunity to raise the same matter in the on-going state proceedings and failed to do so. This is res judicata. The appellant herein sues the petitioner company in the State court.

CONCLUSION

THE ORDER BELOW SHOULD BE AFFIRMED.

Dated: New York, New York
April 12, 1976

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendant-
Appellee Thompson

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

A. SETH GREENWALD
Assistant Attorney General
of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Audrey Gordon , being duly sworn, deposes and says that s he is employed in the office of the Attorney General of the State of New York, attorney for Defendant-Appellee Thompson herein. On the 12th day of April , 1976 , s he served the annexed upon the following named person s :

KASSNER & DETSKY
122 E. 42nd Street
New York, N.Y. 10017

WOHL, LIPTON, LOEWE, STETTNER,
BECKER & KRIM
10 E. 40th Street
New York, N.Y. 10016

Attorney s in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney s at the address es within the State designated by them for that purpose.

Audrey Gordon

Sworn to before me this
12th day of April , 1976

Assistant Attorney General
of the State of New York